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No. 369

In the Supreme Court of the United States

October Term, 1938

THE UNITED STATES OF AMERICA, APPELLANT

v.

DURKEE FAMOUS FOODS, INC.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY

BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

OCTOBER TERM, 1938

No. 309

THE UNITED STATES OF AMERICA, APPELLANT

v.

DURKEE FAMOUS FOODS, INC.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the District Court (R. 14) has not been reported.

JURISDICTION

The order of the District Court sustaining the plea in bar and dismissing, discharging, and quashing the indictment was entered June 28, 1938 (R. 16). The appeal to this Court was applied for and allowed on July 25, 1938. (R. 19.) The jurisdiction of this Court is conferred by the Criminal Appeals Act of March 2, 1907, c. 2564, 34 Stat. 1246

(U. S. C., Title 18, Sec. 682), and by Section 2 of the Judicial Code as amended by the Act February 13, 1925 (U. S. C., Title 28, Sec. 34 An order was entered by this Court on October 1938, noting probable jurisdiction.

QUESTIONS PRESENTED

1. Whether Section 1 of the Act of May 10, 19 which limits the operation of statutes of limitati and authorizes a new indictment where a prior dictment has been found defective or insuffici for any cause after the period of limitation p vided by the applicable statute has expired, p mits the new indictment to be returned at the sa term of court during which the prior indictmen found defective.

2. Whether the application of the Act, in auth izing new indictments whenever prior indictme are found defective or insufficient "for any caus is conditioned upon or affected by the nature the ground upon which the prior indictment quashed.

STATUTES INVOLVED

The Act of May 10, 1934, c. 278, 48 Stat. (U. S. C., Title 18, Sec. 587); the Act of Novem 17, 1921, c. 124, Sec. 1, 42 Stat. 220 (U. S. C., T 18, Sec. 582) prescribing a three-year statute limitations for offenses not capital; and the pe nent provisions of the Criminal Appeals Act 2564, 34 Stat. 1246 (U. S. C., Title 18, Sec. 682) printed in the Appendix, *infra,* pp. 28–30.

STATEMENT

On April 9, 1937, the grand jury empaneled for and in session during the January 1937 term of the United States District Court for the District of New Jersey indicted the appellee in five counts charging violations of the Elkins Act (U. S. C., Title 49, Sec. 41 (1)). Each count of the indictment (R. 1) alleges that under the following circumstances the appellee, on August 17, 1932, unlawfully and knowingly solicited, accepted and received a concession of 2 cents per 100 pounds in respect of the interstate transportation by certain railroad common carriers of a shipment of palm oil, whereby the oil was transported by the railroads at a less rate and charge than that named in their published schedules and tariffs.

The railroads published in their tariffs a line-haul rate of 40 cents per 100 pounds for the transportation of vegetable oils, including palm oil, from alongside steamships or vessels within the free lighterage or floatage limits of New York Harbor, N. Y., to Chicago, Illinois. Their tariffs provided, in connection with the acceptance and handling of shipments to be transported at that rate, that property loaded in tank cars would receive free floatage within the Harbor when loaded in lots of six or more tank cars, or in less than six cars, if the total weight of the entire shipment was 240,000 pounds or more. The tariffs also provided that shipments of palm oil in lots of 240,000 pounds or

more would be handled across the Harbor in tank barges in lieu of tank cars on floats when the barges were ordered by the shipper or consignee, "in writing," and were available, and that when tank barges were so used, the service of pumping and transferring the oil from the barges to tank cars would be at the expense of the shipper, for which service a charge of 2 cents per 100 pounds would be made against the shipper in addition to the 40-cent line-haul rate (R. 1–2).

Appellee ordered, "in writing," from Lehigh Valley Railroad Company, tank barges, in lieu of tank cars on floats, for the transfer of the specified shipments of imported palm oil from alongside the *"S. S. Georgic,"* at Pier 60, North River, New York [and within the free lighterage and floatage limits of the Harbor] to the Claremont Terminal of the Lehigh Valley Railroad Company in New Jersey, and tendered the shipments to the Railroad Company for transportation from Pier 60 to Chicago, Illinois. The Railroad Company accepted the shipments and, through its agent, Manhattan Lighterage Corporation (appellee in No. 310), conveyed the shipments by tank barge from Pier 60 to Claremont Terminal, where the Lighterage Corporation pumped or transferred the oil from the barges to tank cars, and whence the Railroad Company and connecting railroads transported the shipments to Chicago, Illinois (R. 2–3). Appellee paid to the railroads *only* the line-haul rate of 40

cents per hundred pounds (R. 3). The Lighterage Corporation paid the Railroad Company the 2-cent pumping charge. Pursuant to a previous secret arrangement between the appellee and the Lighterage Corporation the appellee never paid any part of the tariff charge for the pumping service to the railroads or to the Lighterage Corporation, and, by that device, obtained the alleged concession of 2 cents per 100 pounds from the published tariff rate (R. 3).

A prior indictment based upon these facts and charging the same offenses had been returned at the April term of court in 1934 (R. 21). A motion to quash that indictment (R. 29) was sustained by opinion filed January 14, 1937 (R. 31–33), and judgment entered February 2, 1937 (R. 11), during the January 1937 term of court,[1] on the ground that the indictment failed to allege the fact that appellee's request upon the railroad for tank barges was made "in writing" as required by the tariff rule (R. 31), which had been laid before the court by stipulation (R. 30).

At the same term of court the Government, invoking the Act of May 10, 1934, re-presented the case to the grand jury empaneled for and in ses-

[1] Thus, almost three years had passed between the return of the indictment and the date on which it was quashed. Meantime, the offenses having been committed in August 1932, the statutory period of limitation had expired in August 1935, and reindictment was barred but for the Act of May 10, 1934.

sion during the January term, 1937, at Trenton, and the grand jury returned the new indictment on April 9, 1937, the January 1937 term having been extended by order of the court (R. 17). The new indictment in five counts contains the allegation that appellee's order for tank barges was made "in writing," thus curing the defect which the court found in the prior indictment (R. 2).

To this new indictment of April 9, 1937, the defendant filed on June 18, 1937, a pleading designated as a "Plea in Bar," alleging (1) that as the offenses charged were committed more than three years preceding the return of the new indictment, prosecution was barred by the statute of limitations (U. S. C., Title 18, Sec. 582); (2) that the indictment was not returned in conformity with the Act of May 10, 1934, because it was returned at the same term and not at the term next succeeding the term at which the prior indictment was found defective; and (3) that the order quashing the prior indictment was appealable under the Criminal Appeals Act and that, therefore, the Act of May 10, 1934, had no application to that order (R. 10).

On June 28, 1938, the court entered judgment (R. 16) ordering—

> that the said Plea in Bar to said indictment herein be and the same is hereby sustained, and that said indictment be not further prosecuted against said defendant, and that said indictment be and the same is hereby accordingly dismissed, discharged, held for nought and quashed.

Construing the Act the court's opinion (R. 14–16) held that its language—

> leads to the inescapable conclusion that where an indictment has been found to be defective after the passage of the prescribed period of limitation, the one and only Grand Jury which can hand down a new indictment is that Grand Jury which is authorized to act at the term next succeeding the term at which the Court found the indictment to be defective; and it appearing, as it does here, that the indictments under review were not found by a Grand Jury authorized as aforesaid, the indictments must necessarily fall.

SPECIFICATION OF ERRORS TO BE URGED

The District Court erred:

1. In sustaining the plea in bar.

2. In holding and adjudging that the statute of limitations had barred prosecution of the offenses alleged in the several counts of the indictment.

3. In holding and adjudging that the Act of May 10, 1934 (U. S. C., Title 18, Sec. 587), did not limit the application of the statute of limitations (U. S. C., Title 18, Sec. 582) so as to permit the new indictment to be returned by the grand jury empaneled at and in session during the same term of court at which the prior indictment was found defective and insufficient.

4. In holding and adjudging that the Act of May 10, 1934 (U. S. C., Title 18, Sec. 587), was effective to stay the statute of limitations only where the new

indictment is returned by a grand jury in session during the next succeeding term of court following the term at which the prior indictment was found defective or insufficient.

5. In entering the order of June 28, 1938, sustaining the plea in bar and dismissing and quashing the indictment.

SUMMARY OF ARGUMENT

I. The Act of May 10, 1934, prevents the bar of the statute of limitations from becoming effective under the described circumstances until the end of the term of court next succeeding the term during which the prior indictment is quashed. The time thus added to the three-year period of limitations is continuous. The District Court erred in holding that Section 1 of the Act does not permit reindictment at the same term during which the prior indictment was found defective, and that, therefore, the statute of limitations barred reindictment in this case. The decision (1) is contrary to the purpose of the Act and is not required by the language of Section 1; (2) is contrary to the policy and frustrates the essential object of statutes of limitations "to encourage promptitude in the prosecution of remedies", *Riddlesbarger* v. *Hartford Insurance Co.*, 7 Wall 386, 390; (3) creates unnecessary inconsistency between the two sections of the Act, and results in an illogical and unreasonable break within the period of limitation, which is without parallel in previous Acts of Congress.

II. The new indictment was within the authority conferred by the Act to reindict whenever an indictment is found defective or insufficient "for any cause." As the authority to reindict is unconditional, its exercise clearly is not restricted to cases in which no appeal is allowed by the Criminal Appeals Act.

ARGUMENT

I

The District Court Erred in Holding That Section 1 of the Act Does Not Permit Reindictment at the Same Term of Court During Which the Prior Indictment Was Found Defective

The Act of May 10, 1934, was enacted to circumvent the efforts of defendants in criminal cases to delay prosecution, by dilatory motions and collateral proceedings, until, in the event of favorable judgments, the statutes of limitations will have barred reindictment. The Act is entitled "An Act To limit the operation of statutes of limitations in certain cases." It undertakes to extend or enlarge the period of time prescribed by the applicable statutes of limitations in cases wherein either of these situations arises: (a) when an indictment is found defective *after* the applicable period of limitation has expired, and (b) when an indictment is found defective before the applicable period of limitation has expired but it would expire before the end of the next regular term of court.

The purpose was "to prevent the escape of those who had been seasonably indicted, but whose indictment was bad because of some corrigible mistake." L. Hand, J., in *United States* v. *Strewl*, 99 F. (2d) 474, 477 (C. C. A. 2d).

Although enacted as a separate statute, the Act operates as an amendment or proviso to the statute which prescribes the period of limitation for prosecution of the offense in a particular case. It does not create a period of limitation separate or apart from applicable statutes of limitations for it operates only in conjunction with those statutes. The Act, therefore, attaches to the existing statute as its effect expires, and "tacks" on the additional time which is allowed for reindictment, thus preventing the bar of the existing statute from falling upon the offense and avoiding a break in the continuity of the period within which the offense may be prosecuted.

As the statute of limitations (U. S. Code, Title 18, Sec. 582) which is applicable to the indictment in this case had expired before the prior indictment was quashed, the new indictment, the validity of which is the issue here, was returned under the circumstances described by Section 1 of the Act. That section authorizes, when an indictment is quashed after expiration of the applicable period, the return of a new indictment "at any time during the next succeeding term of court following such finding, during which a grand jury thereof shall be in session."

Section 2 provides that, when an indictment is quashed before expiration of the applicable period and such period will run before the end of the next regular term of court, a new indictment may be returned "not later than the end of the next succeeding term of such court, regular or special, following the term at which such indictment was found defective or insufficient, during which a grand jury thereof shall be in session."

Section 3 expressly provides that the defense of the statute of limitations shall not prevail against new indictments returned under the Act, and Section 4 declares that the provisions of the Act shall not apply to any indictment against which the statute of limitations has run at the date upon which the Act was passed.

Although neither section mentions the moment which marks the beginning of the additional time which the Act allows for reindictment, it will be noted that while Section 1 provides that a new indictment may be returned at any time "during the next succeeding term of court * * * during which a grand jury thereof shall be in session", Section 2 provides that a new indictment may be returned "not later than the end of the next succeeding term of such court, * * * during which a grand jury thereof shall be in session." Certainly, both sections fix the same time for expiration of the period intended for reindictment.

The Government contends that the purpose and intent of the Act as a whole is to prevent the bar

of the applicable statute of limitations from falling upon the offense when either of the described situations arises and thus, to extend, without break in continuity, the period provided by the applicable statute, from the moment the circumstances described in either of the two sections arise to the end of the next succeeding term of court.

The court below, conceiving itself bound by the literal meaning of the words "during the next succeeding term of court," held that the only grand jury which is authorized to return a new indictment under Section 1, is the grand jury empaneled for the term next succeeding the term at which the prior indictment was quashed, and that the new indictment in this case was unauthorized because it was returned by the grand jury empaneled for the same term of court at which the prior indictment was quashed instead of the next succeeding term. The decision necessarily holds that Section 1 of the Act fails "to limit" the operation of statutes of limitations during the remainder of the term at which the prior indictment is quashed, but instead allows the bar of the statutes to fall at the moment the prior indictment is quashed, thus clothing the offense with repose and immunity from prosecution from that moment to the beginning of the next succeeding term of court when the offense is "revived" for prosecution.

1. THE DECISION BELOW IS CONTRARY TO THE PURPOSE OF THE ACT AS A WHOLE AND IS NOT REQUIRED BY THE LANGUAGE OF SECTION 1

The sole purpose of the Act is to allow a reasonable additional time for reindictment following the quashing of a prior indictment in either of the described situations. The logical manner of accomplishing this purpose is by superseding the statute of limitations and preventing its bar from "operating" or becoming effective, as otherwise it would, concurrently with the quashing of the prior indictment. And, that this is what Congress intended is indicated by the declaration in the title, that the Act is "to limit the operation" of the applicable statute. Certainly, it is *not* the purpose of the Act to permit the bar of the statute of limitations to become effective; and nothing expressed in its language or to be implied from its purpose to provide additional time, could possibly justify the conclusion that Congress intended that the bar of the statute should become effective upon the quashing of the prior indictment and prevent reindictment until the next term. If, as the lower court holds, Section 1 of the Act does not expressly state that a new indictment may be returned at the same term during which the prior indictment was quashed, then, neither does it expressly declare that a new indictment shall *not* be returned at that same term, nor

does it expressly state that the statute of limitations shall operate, as the decision below necessarily holds, to bar reindictment during the part of that term which remains after the prior indictment is quashed.

The language of Section 2 makes it clear that the additional time for reindictment is intended to begin the moment the prior indictment is quashed, and that the bar of the applicable statute shall not become effective from that moment to the end of the next term. While that section does not specify the moment when the additional time begins, its use of the expression "not later than" the end of the next succeeding term clearly shows that the additional time for reindictment shall be continuous from the expiration of the applicable period to the end of the next term, thus negativing the possibility of the bar of the statute becoming effective until after the end of the next term.

There is no apparent reason for any difference in the manner in which the periods of additional time provided by the two sections should be applied, and the court below suggested none. The legislative history of the Act fails to disclose any intended difference in the application of the additional period authorized by the two sections. On the contrary, it shows beyond question that the application and operation of the additional time should be the same under both sections. The report

f the Senate Judiciary Committee[2] shows that the ame additional period of time for a new indict- ent was intended regardless of whether the prior ndictment is found defective "after the period rescribed by the statute of limitations has run, *or* here said period of limitations has not run but ill expire before the end of the next regular ses- on of the court, * * *"

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[2] JUDICIARY COMMITTEE REPORT—S. 405, February 28, 34 (Calendar, March 5, 1934).

Mr. King, from the Committee on the Judiciary, submit- d the following:

REPORT

To accompany S. 2460

The Committee on the Judiciary, having had under con- deration the bill (S. 2460) to limit the operation of statutes limitations in certain cases, reports the same favorably to e Senate and recommends that the bill do pass, with the llowing amendment:

On page 1, lines 7 and 8, strike out the words "the expira- on of said period of limitations", and insert in lieu thereof e words "such finding".

The purpose of this legislation is set out in the following tter from the Attorney General to the chairman of this mmittee.

JANUARY 17, 1934.

on. HENRY F. ASHURST,

Chairman Committee on the Judiciary,

United States Senate,

Washington, D. C.

MY DEAR SENATOR: In some criminal cases the offense is t discovered until the statute of limitations has nearly n. In other cases defendants are not apprehended for me time or removal proceedings are instituted and appeals ken from habeas corpus orders refusing to release the de- ndant on removal order, and in still other cases dilatory

The opinion below shows that the court gave th words of Section 1 their most narrow and liter meaning and that no consideration was given th intent of Congress, the purpose of the Act as whole, or the language of Section 2.

The court was not bound to adopt a strict co struction or to accept the literal meaning of th words of Section 1. Statutes of limitations havin to do with statutory crimes are "to be liberally in terpreted in favor of repose, * * *" *United States* v. *Scharton,* 285 U. S. 518, 521–522. Th decision does not favor repose, or the purpose such statutes to encourage promptitude of actio Instead, it merely creates an "eclipse," for it re ognizes, as the section provides, that during t next succeeding term of court a valid indictme can be returned.

---

motions are made with the hope that, if ultimately sustain the statute of limitations will meanwhile have run agai another prosecution. To safeguard the interests of the G ernment in such cases, legislation is recommended providi that in any case in which an indictment is found defect or insufficient for any cause, after the period prescribed the statute of limitations has run, or where said period limitations has not run but will expire before the end of next regular session of the court, a new indictment may returned at any time during the first succeeding term of co at which a grand jury is in session. The judicial confere favors legislation of this tenor.

A draft of bill to effectuate this recommendation is closed herewith and I shall appreciate it if you will int duce it and lend it your support.

Respectfully,

HOMER CUMMINGS,
Attorney Genera

The Government submits that the court below erred in refusing to apply the rule stated by this Court in *Ozawa* v. *United States,* 260 U. S. 178, 194, as follows:

> It is the duty of this court to give effect to the intent of Congress. Primarily this intent is ascertained by giving the words their natural significance, but if this leads to an unreasonable result plainly at variance to the policy of the legislation as a whole, we must examine the matter further. We may then look to the reason of the enactment and inquire into its antecedent history and give it effect in accordance with its design and purpose, sacrificing, if necessary, the literal meaning in order that the purpose may not fail. See *Holy Trinity Church* v. *United States,* 143 U. S. 457; *Heydenfeldt* v. *Daney Gold Mining Co.,* 93 U. S. 634, 638.

See also *United States* v. *Bowman,* 260 U. S. 94, 102; and *Barrett* v. *Van Pelt,* 268 U. S. 85, 90–91.

2. THE DECISION OF THE COURT BELOW IS CONTRARY TO THE POLICY AND FRUSTRATES THE ESSENTIAL OBJECT OF STATUTES OF LIMITATIONS

Statutes of limitations are legislative acts prescribing definite periods of time within which prosecutions or actions must be brought. Such designation of a specified period of time puts the offender on notice that he may be called to account at any time during that period and at the same time assures him that when this period has ended he

shall be immune to prosecution or legal acti
Such statutes "stimulate to activity and pun
negligence." *Wood* v. *Carpenter,* 101 U. S. 1
139. "The policy of these statutes is to encour
promptitude in the prosecution of remedie
Riddlesbarger v. *Hartford Insurance Company*
Wall. 386, 390. This Court said in *Weber* v. *H*
bor Commissioners, 18 Wall. 57, at p. 70:

> Statutes of limitation, as observed in
> recent case in this court, [*Riddlesbarger*
> *Hartford Insurance Company,* 7 Wall. 39
> "are founded upon the general experience
> mankind, that claims which are valid are
> usually allowed to remain neglected. T
> lapse of years without any attempt to
> force a demand, creates, therefore, a p
> sumption against its original validity,
> that it has ceased to subsist. This presu
> tion is made by these statutes a positive b
> and they thus become statutes of repo
> protecting parties from the prosecution
> stale claims, when by loss of evidence fr
> the death of some witnesses and the imp
> fect recollection of others, or the destruct
> of documents, it might be impossible to
> tablish the truth."

The designated period of time begins, of cou
when the offense is committed or the right of
tion accrues, and the only effect of the statut
"to restrict the period within which the ri
otherwise unlimited, might be asserted." *Ridd*
barger v. *Hartford Insurance Company, su*

The period thus fixed, unless expressly declared otherwise, is continuous, for these statutes "proceed upon the principle that the courts of the country where the person to be prosecuted resides, or the property to be reached is situated, are open during the prescribed period to the suitor." *Brown* v. *Hiatts*, 15 Wall. 177, 184.

The decision below, in importing into the Act without express provision therefor an interim during which prosecution is paralyzed, forces delay in the very face of the fundamental policy and object of statutes of limitations to encourage promptitude and punish delay. As no conceivable purpose is served by interposing this interim of futility, the decision below assumes that Congress intended "a vain and senseless thing"—an assumption which this Court has said it was "not at liberty" to indulge. *Clark* v. *Barnard*, 108 U. S. 436, 460, 461. *Sandberg* v. *McDonald*, 248 U. S. 185, 196. The decision, further, contravenes the fundamental policy of such statutes by so construing this Act as to revive the offense after having reduced it to a state of repose and clothed it with immunity during the interim between the quashing of the prior indictment and the beginning of the next term of court.

It was the duty of the District Court, under the decisions of this Court, to construe the language of Section 1 so as to effectuate the purpose of the Act as a whole and the policy and object of the statutes of limitations of which it is a part, and to harmo-

nize the language of that section with this objec
and with the provisions of Section 2 as well.

In *United States* v. *Katz,* 271 U. S. 354, th
Court repeated the rule that (p. 357):

> All laws are to be given a sensible con
> struction; and a literal application of a stat
> ute, which would lead to absurd conse
> quences, should be avoided whenever a rea
> sonable application can be given to i
> consistent with the legislative purpose.

The decisions of this Court require that the A
be construed as including within the addition
time which it allows for reindictment the r
mainder of the term at which the prior indictme
was quashed, if, as demonstrated above, it appea
that this was the intention of Congress. In *Bo
rett* v. *Van Pelt,* 268 U. S. 85, at p. 90, this Cou
held that "The intention of the law-maker cons
tutes the law" and applied the rule that "A thi
which is within the intention of the makers of
statute is as much within the statute as if it we
within the letter, and a thing which is within t
letter of a statute, is not within the statute, u
less it is within the intention of the makers."
United States v. *Bowman,* 260 U. S. 94, it was h
that a criminal statute (Sec. 35, Criminal Code,
amended, 40 Stat. 1015) confers jurisdiction in t
Southern District of New York of a conspir
committed on the high seas, or in Brazil, to defra
the United States, despite the lack of express wo

conferring such jurisdiction. The Court said at page 102:

> We can not suppose that when Congress enacted the statute or amended it, it did not have in mind that a wide field for such frauds upon the Government was in private and public vessels of the United States on the high seas and in foreign ports and beyond the land jurisdiction of the United States, and therefore intend to include them in the section.

3. THE DECISION BELOW PRODUCES UNNECESSARY INCONSISTENCY BETWEEN THE TWO SECTIONS OF THE SAME ACT, AND ILLOGICAL AND UNREASONABLE RESULTS WHICH ARE WITHOUT ANALOGY IN THE ACTS OF CONGRESS DEALING WITH STATUTES OF LIMITATIONS

The literal interpretation of Section 1, by the court below, produces a break in the continuity of the period of limitation as enlarged by the Act, permitting the bar of the statute to operate and thus to reduce the offense to a state of repose and immunity during the remainder of the term at which the prior indictment is quashed, after which it revives the offense for prosecution until the end of the next succeeding term. This interpretation of Section 1, as argued above, is plainly inconsistent with Section 2 which, by using the words "not later than the end of the next succeeding term," clearly authorizes the new indictment to be returned at the same term during which the prior indictment

is quashed, maintains the continuity of the period of limitation and does not permit the bar of the statute to take effect until the end of the next succeeding term.

Interruption of, or break in, the continuity of the period for reindictment under Section 1, as construed by the District Court, is wholly illogical and unreasonable. Apart from the strict and literal meaning of the language of Section 1, neither the court nor the appellee suggests any reasons whatever for the delay in prosecution and the frustration of the statutory period resulting from their interpretation.

The break in the continuity of the period of limitation, the interposition of an interim of repose, and the revival of the offense after such interim, have no parallel in the Acts of Congress prescribing periods of limitations. In all such Federal statutes, so far as our search discloses, the prescribed period of limitation is *continuous* from the date the offense is committed to the end of the designated period, and in none of them has Congress sought to interrupt the period and hinder or delay the Government in accomplishing the very thing which the statute requires, namely, prompt prosecution. [See Foster, Federal Practice, Vol. I, 6th ed., p. 1015, *et seq.*] Congress has, of course, recognized that situations arise which render prosecution temporarily impossible, and it has specially provided in some of the statutes that the durati

of such situations shall not be treated as part of the period of limitation. For example, Section 583 (U. S. Code, Title 18) expressly provides that the periods of limitations prescribed in Sections 581 and 582 shall not extend "to any person fleeing from justice." Similarly, this Court held that the statutes of limitations of the States did not run against the rights of actions of parties during the continuance of the Civil War. *Brown* v. *Hiatts,* 15 Wall. 177, 184. But, clearly, such interruptions of the statutory period bear no similarity to the interim of repose which the lower court's decision holds that Congress itself has created within the period as extended by this Act.

In *Hawaii* v. *Mankichi,* 190 U. S. 197, this Court repeated the rule that "the intention of the law-making power will prevail, even against the letter of the statute," and reviewed decisions, quoting from one of them as follows (p. 213):

> So in *Heydenfeldt* v. *Daney Gold & Co.,* 93 U. S. 634, 638, it was said by Mr. Justice Davis: "If a literal interpretation of any part of it (a statute) would operate unjustly, or lead to absurd results, or be contrary to the evident meaning of the act taken as a whole, it should be rejected."

Adherence to this rule instead of the literal meaning of the language of Section 1, of the Act, would have avoided the inconsistency and unreasonable consequences of the decision below, and without violence to the words of that section.

II

THE AUTHORITY CONFERRED BY THE ACT TO REINDICT, IN THE DESCRIBED CIRCUMSTANCES, MAY BE EXERCISED WHENEVER AN INDICTMENT IS FOUND DEFECTIVE OR INSUFFICIENT "FOR ANY CAUSE." ITS EXERCISE IS NOT CONDITIONED UPON OR AFFECTED BY THE NATURE OF THE GROUND UPON WHICH THE PRIOR INDICTMENT IS QUASHED

Appellee asserted in the court below that, apar from its other contentions, the new indictment i this case was not authorized by the Act of May 1 1934, because the "previous indictment was by th court found bad in substance and the allegation thereof not to constitute a crime," that the orde was therefore "appealable" under the Crimina Appeals Act, and that the Act of 1934 "has no ap plication to such an order, but is, and is intende to be, confined to the quashing of indictments fo defects of form and pleadings, which orders are n appealable under 18 U. S. Code, section 682 [Crim inal Appeals Act]" (Paragraph 3, Plea in Ba R. 11).[3]

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[3] Appellee states in its motion in this Court to enlarge t record that it will urge the point before this Court (p. Although we discuss the point, it is open to doubt wheth this Court is required to consider it. The District Cour opinion neither accepts nor rejects this ground of the pl but ignores it and sustains the plea on the sole ground th as the Act did not authorize reindictment at the same te at which the prior indictment was quashed, this indictm was barred by the statute of limitations (R. 14–16). *United States* v. *Curtiss-Wright Corp.*, 299 U. S. 304, 3 330.

As both Sections 1 and 2 of the Act of 1934 declare that a new indictment may be returned "whenever" the prior indictment is found defective or insufficient "for any cause," the Government perceives no basis whatever for this contention. The words "for any cause" so clearly include *every* ground upon which an indictment could be found defective or insufficient, as to preclude the slightest doubt of the application of the Act under the described conditions whenever and for whatever reason any indictment is found defective or insufficient. The contention plainly reads into the words of the Act exceptions which are not and could not be placed there by any possible definition of the words used or by the most tenuous implication from them or from the purpose of the Act.

Also, insofar as the contention asserts that the Act intends reindictment only when prior indictments are quashed for "defects of form," it not only ignores the all inclusive language of the Act of 1934, but also overlooks the provision of U. S. Code, Title 18, Sec. 556, that—

> No indictment found and presented by a grand jury in any district or other court of the United States shall be deemed insufficient, nor shall the trial, judgment, or other proceeding thereon be affected by reason of any defect or imperfection in matter of form only, which shall not tend to the prejudice of the defendant, * * *

Even if it were assumed that the judgment quashing the prior indictment were appealable under the Criminal Appeals Act, there is nothing in the Act of 1934 which conditions its broad authority to reindict upon the availability to the Government of an appeal under the Criminal Appeals Act.

Likewise, there is nothing in the Criminal Appeals Act which affords any basis for the appellee's view. That statute neither prohibits reindictment nor *requires* an appeal. It merely provides the remedy of appeal from a judgment quashing an indictment on the ground of the invalidity or construction of the statute upon which it is founded, or from a judgment sustaining a special plea in bar when the defendant has not been put in jeopardy. *United States* v. *Hastings*, 296 U. S. 188, 192. It leaves the Government free to determine whether it will appeal or reindict. Certainly, that Act does not stand in the way of reindictment *during* the three year period provided by the statute of limitations. And, in the absence of express provision or clear intent to the contrary, it may not be used to restrict the authorization to reindict under the Act of May 10, 1934.

The objects of the two Acts are entirely different and there is nothing in either of them which encroaches upon or restricts the operation of the other.

Moreover, if, as appellee contends, the Act of May 10, 1934, excludes reindictment in cases which may be appealed to this Court, then, the Act would render the appeal futile insofar as further prosecution of the particular offense is concerned in every case in which this Court might affirm the judgment of the District Court. Reindictment based upon this Court's construction would be no less prohibited after the decision by this Court than, as appellee claims, it would before. Cf. *United States* v. *Hastings, supra,* p. 193.

CONCLUSION

For the reasons stated it is respectfully submitted that the judgment of the District Court sustaining the plea in bar should be reversed.

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DECEMBER 1938.

APPENDIX

The Act of May 10, 1934, c. 278, 48 Stat. 772 (U. S. C., Title 18, Sec. 587) reads:

AN ACT To limit the operation of statutes of limitation in certain cases

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That whenever an indictment is found defective or insufficient for any cause, after the period prescribed by the applicable statute of limitations has expired, a new indictment may be returned at any time during the next succeeding term of court following such finding, during which a grand jury thereof shall be in session.

SEC. 2. Whenever an indictment is found defective or insufficient for any cause, before the period prescribed by the applicable statute of limitations has expired, and such period will expire before the end of the next regular term of the court to which such indictment was returned, a new indictment may be returned not later than the end of the next succeeding term of such court, regular or special, following the term at which such indictment was found defective or insufficient, during which a grand jury thereof shall be in session.

SEC. 3. In the event of reindictment under the provisions of this Act the defense of the statute of limitations shall not prevail against the new indictment, any provision of law to the contrary notwithstanding.

SEC. 4. The provisions of this Act shall not apply to any indictment against which the statute of limitations has run at the date of approval hereof.

Approved, May 10, 1934.

The Act of November 17, 1921, c. 124, Sec. 1, 42 Stat. 220 (U. S. C., Title 18, Sec. 582), prescribing a three-year period of limitation for offenses not capital, provides:

That section 1044 of the Revised Statutes of the United States be amended so as to read as follows:

> "No person shall be prosecuted, tried, or punished for any offense, not capital, except as provided in section 1046, unless the indictment is found, or the information is instituted, within three years next after such offense shall have been committed: *Provided, however,* That in offenses involving the defrauding or attempts to defraud the United States or any agency thereof, whether by conspiracy or not, and in any manner, and now indictable under any existing statutes, the period of limitation shall be six years. This Act shall apply to acts, offenses, or transactions where the existing statute of limitations has not yet fully run, but this proviso shall not apply to acts, offenses, or transactions which are already barred by the provisions of existing laws."

The Criminal Appeals Act, c. 2564, 34 Stat. 1246 (U. S. C., Title 18, Sec. 682), insofar as pertinent, provides:

> That a writ of error [now appeal] may be taken by and on behalf of the United States from the district or circuit courts direct to the Supreme Court of the United States in all criminal cases, in the following instances, to wit:

From a decision or judgment quashing, setting aside, or sustaining a demurrer to, any indictment, or any count thereof, where such decision or judgment is based upon the invalidity, or construction of the statute upon which the indictment is founded.

* * * * *

From the decision or judgment sustaining a special plea in bar, when the defendant has not been put in jeopardy.

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